In The

Supreme Court of the United States

October Term, 1976

No. 76-547

HELEN H. SIMMONS,

Petitioner,

vs.

COUNCIL BLUFFS SAVINGS BANK, EXECUTOR OF THE ESTATE OF G. WILLIAM COULTHARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL MURRAY
MURRAY, ALTWEGG & ANDERSON
110 North 2nd Avenue
Logan, Iowa 51546

Attorney for Respondent

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TEXTS CITED

BOUNDARY COMPACT

In The

Supreme Court of the United States

October Term, 1976

No. 76-547

HELEN H. SIMMONS,

Petitioner,

vs.

COUNCIL BLUFFS SAVINGS BANK, EXECUTOR OF THE ESTATE OF G. WILLIAM COULTHARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Council Bluffs Savings Bank, Executor of the Estate of G. William Coulthard, respectfully prays that the Petitioner's Petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Iowa dated June 30, 1976, be dismissed and denied.

RESPONDENT'S SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

Under a sub-heading entitled "History of Disputed Land" commencing at page 10 of her Petition, the Petitioner purports to relate the facts out of which grew the case entitled *G. William Coulthard, Plaintiff v. Clifford L. Simmons and Helen H. Simmons, Defendants,* Equity No. 21771 in the District Court of Harrison County, Iowa. This so-called "History of Disputed Land" is incomplete and inaccurate to an extent that Respondent believes correction and supplementation are in order as follows:

Contrary to the statements made in numbered paragraph 2 on page 11, the undisputed and unchallenged documentary evidence presented to the trial court and certified on appeal to the Iowa Supreme Court told the story of where the main channel of the Missouri River was during the period of time prior to the winter of 1938-1939. This evidence clearly shows that between 1858 and about 1890, the main channel moved gradually southeasterly, washing away and destroying all of the land along its left (Iowa) bank. The maps of that era clearly show that in that movement, all of Government Lot 5 was washed away and destroyed and its identity was destroyed. Also, Mr. Stuart Smith, the expert surveyor witness who was called by both parties and whose testimony stands without contradiction, testified that in his opinion, Government Lot 5 was washed away and destroyed sometime before 1879.

Behind this southeasterly movement of the channel, accretion land formed to the river's right (Nebraska) bank. By about 1890, accretion land had formed in Nebraska completely occupying the same spot under the sky where

Government Lot 5 in Iowa had formerly been. This newly formed land was factually and legally in Nebraska because at that time, the Iowa-Nebraska State Boundary was the thalweg of the Missouri River, per the "rule of the thalweg" laid down by this Court in *Nebraska v. Iowa,* (1892) 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186. That is to say, the state boundary moved southeasterly with the thalweg between 1858 and 1890, and as it passed over and across the spot under the sky where Government Lot 5 had been, that spot came under the sovereignty and jurisdiction of Nebraska.

The undisputed documentary evidence is that the main channel of the river continued to flow in the channel southeasterly from the disputed land, and the newly formed accretion land continued to exist in Nebraska in the former location of Government Lot 5 (as part of a much larger tract of accretion land) until the U. S. Army Corps of Engineers diverted it into the California Cutoff canal during the winter of 1938-1939.

The undisputed testimony in the trial court was that one Henry Mencke of Blair, Nebraska, adversely, openly and peaceably possessed the disputed land in Nebraska from 1926 through 1938, used it in his farming operations, claiming it as accretions to his Nebraska high bank land contiguous on the West.

As mentioned hereinabove, the Corps of Engineers dredged a canal and diverted the main channel of the Missouri River into it during the winter of 1938-1939. This canal was for the purpose of cutting off the large horseshoe bend of the river which had been known as California Bend, and the new canal channel naturally was known as California Cutoff.

Although the Corps of Engineers shifted the thalweg from the old natural channel southeasterly from the disputed land to the new canal channel west of the disputed land in 1938-1939, the disputed land remained in Nebraska, subject to Nebraska sovereignty and jurisdiction, because the shift of the thalweg was a man-made avulsion, and the Iowa-Nebraska Boundary Line therefore remained in the abandoned channel of California Bend. The eyewitness testimony and the aerial pictures of 1938 and 1939 from the files of the Corps of Engineers are undisputed and conclusive that the Nebraska land which was in the concave side of California Bend, and which included the disputed land, was not washed away or destroyed when the thalweg was shifted from one side of it to the other.

In numbered paragraph 3 on page 11, the Petitioner relates that a tax deed was issued in May, 1938, from the Treasurer of Harrison County, Iowa, to Harrison County, Iowa, "which included lands in Harrison County east of the California Cutoff . . .". Petitioner seeks to obfuscate what really happened. Her inference is that this tax deed conveyed the disputed land. In truth and in fact, the tax deed purported to convey old Government Lot 5, the land that had been washed away and destroyed and its identity destroyed back before 1879.

Petitioner refuses to acknowledge the concept that the disputed land is not Government Lot 5; that it is newly formed accretion land which, as of May, 1938, was west of the Missouri River (the California Cutoff canal hadn't even been dredged yet), in the State of Nebraska, subject to the sovereignty and laws of Nebraska, and in the peaceable possession of a Nebraskan. There is no way that the

Treasurer of Harrison County, Iowa could be conveying the disputed land to anybody in May of 1938.

Not until 1943 did Iowa gain sovereignty over the disputed land by operation of the 1943 Iowa-Nebraska Boundary Compact (Appendix H attached to Petitioner's Petition), particularly Sections 2 and 3 of the Nebraska enactment. The Compact fixed the state boundary as the center line of the California Cutoff canal, and Nebraska ceded to Iowa all lands formerly in Nebraska but lying easterly of said boundary.

For the first several years after the disputed land was severed from the main part of the Mencke farm by the main channel of the Missouri River flowing down through the Cutoff canal, Henry Mencke continued to possess it and use it in his farming operations by barging things to and from it across the river. Until about 1954, nobody tried to use or possess it from the Iowa side because an impenetrable swamp existed in the abandoned channel where the pre-1939 main channel had been.

Henry Mencke conveyed the disputed land to his son, Ralph Mencke, in 1947, and Ralph Mencke later conveyed to G. William Coulthard, so that Respondent is now the owner and holder of the Mencke title.

The great flood of the Missouri River which occurred in 1952 caused silt and sand to be deposited in the swamp which had theretofore made the disputed land inaccessible from the Iowa side. One Maurice Cleaver, who rented all of the land in that vicinity owned by the C & NW Railway Co., thinking the disputed land was covered by his lease, started using the disputed land in his farming opera-

tion as pasture for his cattle. In 1954, there was an unfenced segment of boundary line between the C & NW Ry. Co. land on the south and the C. L. and Helen H. Simmons land on the north. This gap was northeasterly from the disputed land and adjacent to the pasture where the Cleaver cattle were, and the cattle estrayed from the pasture to the Simmons farm. To stop this estraying, Mr. Cleaver decided to build a fence in the gap. He first invited Mr. Simmons to take part in the project by building one-half of the necessary fence, all in accordance with the Iowa law regarding boundary line fences. Mr. Simmons declined the invitation but said he had no objection if Mr. Cleaver would build the fence as a project of his own.

Mr. Cleaver built the fence. It enclosed the disputed land within the boundary fences of the C & NW Ry. Co. farm, purchased by Mr. Coulthard in 1959, and it has been continuously within the boundary fences of the Coulthard farm until today. The railway company, through its tenant Mr. Cleaver, and G. William Coulthard personally and through his tenant, Delmar Chandler, were in peaceable, open, continuous and adverse possession of the disputed land from 1954 until 1967. Nobody disturbed their possession or challenged their right to possession until 1967, when Petitioner twice cut the boundary fence which Mr. Cleaver had built, thus precipitating the commencement of Mr. Coulthard's case to quiet his title.

As Petitioner relates at page 14 of her Petition, Mr. Coulthard cleared the disputed land in 1961-1962. Figuratively speaking, Mr. and Mrs. Simmons watched from across the fence silently, without any objection. That is to say, the Respondent made valuable improvements, and

even this didn't trigger any claim of ownership by the Simmonses.

The Petitioner claims in paragraph No. 8 on page 12 that the C & NW Railway Co. disclaimed ownership of the disputed land in 1959 in a then pending quiet title case. This is not possible in view of the fact that the disputed land was never involved in the case. Also, we must constantly keep in mind that Government Lot 5 went out of existence forever sometime prior to 1879. And finally, as the Iowa Supreme Court stated in its opinion, the railway company's allegation was not a disclaimer, but only an allegation that Simmons claimed title. (See page 35 of Appendix A attached to Petitioner's Petition.)

The Petitioner relates in paragraph No. 11 on page 14 that Mr. Coulthard acknowledged her title to the disputed land in 1964 by offering to buy it. Actually, the evidence establishes that he was offering to buy them out entirely and totally in that area; and for his offered price, he expected to get not only everything the Simmonses owned, but also everything they claimed, in the area. The Iowa Supreme Court correctly rejected this claim, citing the following authorities: 5 Thompson on Real Estate, Sec. 2552, page 574 (1957); 3 Am. Jur. 2d, Adverse Possession, Sec. 85, page 169 (1962); see also Annot. 125 A. L. R. 825. (See pages 35 and 36 of Appendix A attached to Petitioner's Petition.)

In paragraph No. 7 on page 12, the Petitioner claims that she has paid all of the taxes levied and assessed against Lots 1, 2, 3, 4 and 5, "including the disputed land" since 1954. This is just another instance of her refusal to

acknowledge the fact that Lot 5 was washed away and destroyed sometime before 1879, and the disputed land cannot be described or taxed as "Lot 5" because the disputed land is newly formed accretion land, formed in Nebraska and ceded to Iowa by the 1943 Boundary Compact.

———o———

RESPONSE TO PETITIONER'S "REASONS FOR GRANTING THE WRIT" AND ARGUMENT

Petitioner's Reason No. 1 commencing on page 20 of her Petition is an allegation that the Supreme Court of Iowa arbitrarily and capriciously cancelled two quitclaim deeds which the Simmonses received from Harrison County in 1954 and 1965. Her particular complaint at this point is that the case entitled *Coulthard v. Simmons,* which was then before the court, only involved 25 acres of the 300 or more acres of land which were quitclaimed to her by the deeds. It is her misconstruction of the decision and opinion of the Supreme Court of Iowa that the court not only cancelled the deeds as to the 25 acres over which it had jurisdiction in the case, but also as the whole 300 acres or more.

There is nothing in the Iowa Supreme Court's decision or opinion (or in the trial court's judgment and decree) indicating any intention to affect the title to any land other than that over which it had jurisdiction. There is no reason to presume that the Iowa Supreme Court was attempting to wrongfully exceed or enlarge its jurisdiction.

The case entitled *Coulthard v. Simmons* was a quiet title case. Coulthard prayed that his title be quieted and

that any and all deeds clouding his title to the land particularly described in his Petition be nullified and voided. In deciding the case for Coulthard, and in order to grant him the effective relief for which he had prayed, the Iowa courts could do no less than nullify the Simmons' quitclaim deeds insofar as they constituted clouds on the Coulthard title to the 25 acres. It would have been superfluous to say that the operation of the decision was limited to the 25 acres over which the court had jurisdiction. It was elementary that the court couldn't offect the operation or non-operation of the deeds on any other land in any event.

It simply is not true that the decision of the Iowa Supreme Court in this case constitutes giving the State of Iowa a "windfall of approximately 300 acres of Simmons' land". Ownership of said 300 acres is the issue to be decided in the case of *State of Iowa v. Harrison County, Simmons, Coulthard, et al.,* now pending in the District Court of Harrison County, Iowa. Nobody has asserted in that case that the Iowa Supreme Court's decision in *Coulthard v. Simmons* is res adjudicata because it is not res adjudicata.

Petitioner says that the decision of the Supreme Court of Iowa conflicts with "a host of decisions" by this court. *Hanson v. Denckla,* 357 U. S. 235, 250 (1958) is cited but it is not in point. Respondent hasn't been able to discover any such conflicting decisions and believes there are none.

———o———

In Petitioner's Reason No. 2 commencing on page 21 of her Petition, she asserts that the Iowa Supreme Court evaded constitutional issues raised by her. There was no such evasion. It inheres in the decision that every constitutional issue raised by her was decided against her. It is immaterial that the Iowa Supreme Court elected not to write about the constitutional issues in its opinion. Petitioner did not raise any constitutional issues in the trial court, thus indicating that she herself held the constitutional issues in low esteem until they became her only hope of one more appeal.

She also asserts that the Iowa Supreme Court's decision was "shockingly wrong" and "totally devoid of evidentiary support".

The decision is not shockingly wrong. On the contrary, it is a good faith effort on the part of the Iowa courts to apply, interpret and construe the 1943 Iowa-Nebraska Boundary Compact in accordance with its terms and spirit. By Section 2 of the Nebraska enactment of the Compact, Nebraska ceded to Iowa jurisdiction over much land, including the disputed land in this case. By Section 3 of the Iowa enactment, Iowa (including Iowa's courts) agreed that all titles to ceded lands that had been "good in Nebraska shall be good in Iowa". To award title to the d i s p u t e d land to anybody other than Mr. Coulthard, the owner and holder of the Mencke (Nebraska) title would have been a clear violation of the Boundary Compact. It would also have been disobedience to this Court's directions in *Nebraska v. Iowa,* 409 U. S. 285 (1972).

By Iowa appellate rules, an appeal in an equity case to the Iowa Supreme Court is triable de novo. This requires the Supreme Court to examine the Record on Appeal in equity cases with particular care. Reading of Justice LeGrand's opinion is convincing that this Record on Appeal was examined with particular care, and that the facts found are amply supported by good and competent evidence.

—o—

In Petitioner's Reason No. 3 commencing on page 23 of her Petition, she argues that because Coulthard "had no standing" to attack the tax deeds and quit claim deeds on which her claim of title depended, the Iowa Supreme Court had no jurisdiction of the subject matter, and that the Supreme Court's decision and opinion are therefore void. Her theory is that Iowa Code Section 614.22 guarded her tax title and stripped Coulthard of "standing" to attack it.

The fatal defect in Petitioner's claim at this point was pointed out by the Iowa Supreme Court in its opinion by simply quoting from the statute itself. (See pages 36 and 37 of Appendix A attached to Petitioner's Petition.) In order for a claimant to have the protection of Section 614.22, he or she must first establish that he or she had possession of the disputed property on July 4, 1961. There is not a scintilla of evidence that the Simmonses ever had possession of the disputed property. As a matter of fact, Mrs. Simmons relates in her own statement of facts that it was in 1961-62 that Mr. Coulthard caused the disputed

land to be cleared for farming (Petition, par. 10 on page 14).

Failing to establish actual possession, which the statute obviously requires, Petitioner next theorizes that she had "constructive possession" because she was the "record titleholder". The trouble with this theory is that she was not the record titleholder either. She held record title to nothing; Government Lot 5, the land described in her quitclaim deeds, had been washed away and destroyed and its identity destroyed sometime before 1879; the disputed land is not Government Lot 5 or any part thereof; the disputed land is a tract of land created by accretion in the State of Nebraska in about 1890, and ceded to Iowa by operation of the 1943 Iowa-Nebraska Boundary Compact. *Tyson v. State of Iowa,* 283 F. 2d 802 (1960); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 720 (1959).

The next theory advanced by the Petitioner in Reason No. 3 is based on Iowa Code Section 448.7. Her claim is that Coulthard had no standing to attack the 1938 tax deed, upon which her claim to the disputed land is based, because he had not paid all taxes due upon the property. Her theory and claim at this point are invalid for at least two reasons: First, the Iowa Supreme Court has consistently held that Code Section 448.7 does not apply where the tax deed under attack is void, as distinguished from merely defective or voidable. *Inter-Ocean Reinsurance Co. v. Bartleson,* 234 Iowa 335, 11 N. W. 2d 688 (1943); *Thompson v. Chambers,* 229 Iowa 1265, 296 N. W. 380 (1941); *Jordan v. Beeson,* 225 Iowa 460, 280 N. W. 625 (1938). In other words, Code Section 448.7 cannot be used or construed to "make a silk purse out of a sow's ear." The 1938 tax deed from the Harrison County

Treasurer to Harrison County was void, not merely defective or voidable, for reasons hereinbefore mentioned: There was no such land in existence in 1938; the land the deed purported to convey had been washed away and destroyed; the new land which had formed in the same spot under the sky was as of 1938 and had been for more than 40 years in the State of Nebraska, not subject to being taxed in Iowa, not subject to being sold for non-payment of Iowa taxes, not subject to Iowa sovereignty or jurisdiction in any manner whatsoever. Second, no taxes have ever been levied or assessed upon the disputed land in Iowa. The county officials may have been trying to tax the disputed land by taxing Government Lot 5, but the disputed land is not Government Lot 5: hence, there have been no taxes for the Respondent to pay.

—o—

In Petitioner's Reason No. 4 commencing on page 26 of her Petition, she argues that the decision of the Supreme Court of Iowa in *Coulthard v. Simmons* casts a cloud over all deeds issued by counties which purport to convey riparian lands along the Missouri River.

Respondent's response to that argument is that any quitclaim deed issued by a county (and that is the only kind of deed that can be issued by an Iowa county), should be taken by the grantee with his eyes wide open. Caveat emptor should be the rule. The Iowa law is and always has been that the county makes no representation that it owns or has any interest in the land which it purports to convey by quitclaim deed; there is no representation that the land even exists. In other words, caveat emptor not

only should be the rule; it is and always has been the rule. *Bremhorst v. Coal Company,* 202 Iowa 1251, 211 N. W. 898 (1927).

Marketable Title Acts should not be permitted to perform miracles. They cannot be construed to create title or ownership where none existed before. They should not be interpreted so as to resurrect land long since washed away, destroyed and its identity destroyed.

The record in the trial court and in the Supreme Court of Iowa shows that the Simmonses gambled by paying $341.70 to Harrison County in 1954. They acquired whatever claim the county had to 189.63 acres of land, an average price of $1.80 per acre. They knew or should have known from the cheapness alone that there was something wrong about the transaction. There was something wrong! Harrison County didn't own or have any interest in the property being sold. The property didn't even exist. It had been washed away more than 75 years before. Mr. and Mrs. Simmons, blinded by their desire to get this bargain, forgot all about caveat emptor, ignored the time honored rule of "buyer beware". Now, Mrs. Simmons asks this court to retrieve her chestnuts from the fire; it should not be done for her.

Petitioner would lead this court to believe that many tax deeds like the one here involved or similar to it are in existence up and down the Missouri River, being relied upon by many people as muniments of title. She asserts that if the Iowa Supreme Court's decision is permitted to stand, all such deeds will be jeopardized, and confusion will reign.

In truth and in fact, very few tax deeds bearing any similarity to the 1938 tax deed involved here were ever issued. The detailed facts of this case are unique and perhaps singular. There will not be any great upheaval along the Missouri River caused by the Iowa Supreme Court's decision of *Coulthard v. Simmons.* The decision is just, equitable, fair and correct and it should not be subjected to further review by Writ of Certiorari.

CONCLUSION

For the reasons set forth hereinabove, the Respondent respectfully prays that the Petition for a Writ of Certiorari herein be dismissed and denied.

Respectfully submitted,

MICHAEL MURRAY
MURRAY, ALTWEGG & ANDERSON
110 North Second Avenue
Logan, Iowa 51546
Attorney for Respondent